RECENT CASES.

AGENCY — DEL CREDERE FACTOR — CLAIM AGAINST ESTATE OF INSOLVENT PRINCIPAL. — A factor under a *del credere* commission was by his contract to make monthly advances to his principal. The principal became insolvent, and the question arose whether the factor could prove for his full claim against the assignee and look to the property in his hands for anything still due. But it was *held*, that he must exhaust that property first, and only prove against the assignee for the balance. *Balderston* v. *Rubber Co.*, 27 Atl. Rep. 507 (R. I.).

The advances are treated substantially as prepayment to the principal. The factor, therefore, had no claim until he had exhausted the property in his hands. The case follows *Gihon* v. *Stanton*, 9 N. Y. 476, and seems to adopt a sensible construction of the contract of a *del credere* factor who makes advances. As the court point out, the term "advance" is meaningless if the party who makes an advance can immediately turn round and sue to recover it back. *Upham* v. *Lefavour*, 11 Met. 174, and *Dolan* v. *Thompson*, 126 Mass. 183, are treated in the principal case as opposed to the doctrine there expressed. Probably they go no farther than to say an advance is a loan for a reasonable time, and after the expiration of such a time the factor can sue for the loan without first exhausting the property in his hands. They are, therefore, opposed to the opinion expressed in the principal case as to the precise construction of the contract, but would not necessarily involve a different result upon the facts.

BILLS AND NOTES — CONSTRUCTIVE NOTICE. — The directors of a railroad corporation authorized one Frost, its president, to purchase flat cars and give notes of the corporation for that purpose. In pursuance of this vote notes were made in the name of the corporation, and signed by Frost as president. For safety of the corporation in case of loss, instead of making the notes payable in blank, they were made payable to the order of Bruen, Frost's private secretary, who was to indorse them when Frost got ready to use them. Subsequently these notes, having received the blank indorsements of Bruen and of Frost & Son, a firm of which said Frost was a member, were pledged by Frost, together with bonds belonging to the firm, as collateral security for a loan made by the plaintiff to the firm. Frost appropriated the loan to his own use. Later the plaintiff became entitled to the notes outright, and brought action upon them against the corporation. *Held*, that as the plaintiff knew that Frost was president of the corporation, he was bound to inquire how the president came to use the notes for his individual benefit, and therefore the plaintiff acted at his peril and cannot recover. *Cheever* v. *Pittsburgh S. & L. E. Ry. Co.*, 25 N. Y. Supp. 449.

This decision cannot be supported. There was no evidence of any actual notice, and it is impossible to take the step which the court take so easily, and say with them that the plaintiff had constructive notice of fraud, and was put upon his inquiry. The court does not seem to have appreciated fully the transaction between Frost and the plaintiff. It was simply this: Frost, as a member of the firm of Frost & Son, went to the plaintiff to borrow money for the firm, just as any other member of the firm might have done. He obtained the loan to the firm, and gave the plaintiff as security what appeared to be firm property; namely, bonds, and the notes in issue, which, from aught that appeared on their faces, were the property of the firm. We have, then, a case where notes, apparently firm property, are pledged as such by a member of the firm to secure a loan to the firm; and there is no fact shown which could give rise to the application of the principle of constructive notice. See *Freeman's National Bank* v. *Savery*, 127 Mass. 78.

BILLS AND NOTES — DRAFT SENT FOR COLLECTION — PAYMENT. — Plaintiff sent for collection a demand draft on defendant to a bank with which defendant had an account. Defendant was accustomed in such cases to write his acceptance upon the draft, and to pass it back to the bank, where it was treated by defendant and the bank in all respects as a check. According to such custom, defendant wrote his acceptance on the draft in suit, passed it back to the bank, and charged himself with the amount in his pass-book; but the bank failed before remitting to the plaintiff. *Held*, that this transaction did not amount to payment of the draft. *State Bank of Midland* v. *Byrne*, 56 N. W. 355 (Mich.).

In view of the fact that the collecting bank must be regarded as the plaintiff's agent, it is hard to see how this transaction can be properly distinguished from the defendant's paying the amount in money into the bank, which would surely have been held to be payment to the plaintiff. See *Welge* v. *Batty*, 11 Ill. App. 461.

CONSTITUTIONAL LAW — JUDGMENT OF SISTER STATE — EXECUTION. — A bill in equity is brought, asking specific performance of an order directing the payment of alimony, and the method thereof, made upon a judgment in a suit for divorce in the State of New York. *Held*, that the bill will not be sustained. The first section of the fourth article of the Constitution of the United States, directing that full faith and credit be given to the judgments of a sister State, does not extend to the execution of such a judgment. For this purpose a new judgment must be secured in the State in which an execution is sought, and full faith and credit shall be given to the original judgment as evidence of the matters involved. An execution of the order made upon the original judgment, as regards property without the jurisdiction of the court in which such judgment was obtained, is possible only so long as the person remains within the jurisdiction of that court. *Bullard* v. *Bullard*, 27 Atl. Rep. 435 (N. J.).

The case follows the weight of authority.

CONTEMPT OF COURT — PUNISHMENT. — *Held*, where a petition filed in a court contains scandalous matter reflecting on the integrity of the judge and the master in chancery of the court, it may be stricken from the files without notice, though it sets up a good cause of action. Pleasants, J., dissenting. *Herndon* v. *Campbell*, 23 S. W. Rep. 558 (Texas).

The result is contrary to *Hovey* v. *Elliott*, 21 N. Y. Sup. 108, and to the spirit of *McVeigh* v. *United States*, 11 Wall. 259, p. 267. It is submitted that in the absence of a statute in Texas giving the court power to take such action, the New York decision is the better. It certainly seems contrary to the first principles of justice that the plaintiff here should have his petition stricken from the files without any notice whatever. Every litigant is supposed to have the right of a hearing, at least.

CONTRACTS — CONSIDERATION. —Plaintiff had agreed to furnish wood to defendant at a certain price per cord, but was unable to carry out the agreement on account of the high wages that his workmen demanded. He wrote defendant that he must ask for a better price, and defendant agreed to pay more per cord. *Held*, there was a consideration for the second agreement. *Foley* v. *Storrie*, 23 S. W. Rep. 442 (Texas).

The theory is that the first contract is waived by the making of this second agreement. And, of course, this being true, the mutual promises furnish sufficient consideration for the latter. Hare on Contracts, p. 220; 9 Pick. 298, 305; 9 Cush. 135; 6 Ex. 839; 69 Ill. 403; 36 N. Y. 388, 392; 128 Mass. 116; 47 Mich. 489; 28 Vt. 264. But the better view seems to be that plaintiff was already bound by the first contract; that defendant never agreed to a waiver of it, and consequently that there is no consideration. Wald's Pollock on Contract, p. 179, note v; 6 Ohio St. 1; 52 Ia. 478; 69 Pa. St. 216; 91 N. Y. 392.

CORPORATIONS — LIBEL. — In an action against a corporation for libel it was *held*, that evidence of the defendant's wealth was not admissible. *Randall* v. *Evening News Association*, 56 N. W. Rep. 361 (Mich.).

The courts of Michigan allow this evidence in an action against an individual for libel; but it is considered a dangerous rule, to be used with great care. The court seems right, therefore, in refusing to extend the doctrine to the case of a corporation; but it is submitted that the argument that this sort of evidence is not so material in the present case as in that of an action against an individual is given too great weight in the decision.

CORPORATIONS — PUBLIC DUTIES — ULTRA VIRES LEASE OF FRANCHISE. — A corporation, having a franchise to lay its gas-pipes in the public streets, leased its rights and privileges to another gas company without the consent of the Legislature. The contract was partly carried into effect. *Held*, that no action lay for a breach of covenant in the lease; that the lease was *ultra vires* and void, as the company owed a duty to the public, and the only remedy for the plaintiff corporation would be to disaffirm the lease, and sue as on a *quantum meruit* for the amount which the defendant was actually benefited. *Brunswick Co.* v. *Gas Co.*, 27 Atl. Rep. 525 (Maine).

This is the general rule, namely, that the Legislature has control over a gas company, and that it cannot escape its duty to the public by leasing its franchise. Even admitting this to be so, many cases allow a recovery on the contract when it has been partly performed; but the opposite view, as adopted in this case, is certainly more logical. The authorities upon this subject are in hopeless conflict. See 2 Beach Corp. § 423.

CRIMINAL LAW — CONSPIRACY — RESTRAINT OF TRADE. — Retail coal dealers formed an association to fix prices of coal at Lockport. According to the by-laws, a vote of the association determined prices, subject to the limitation that they must be reasonable, and never more than one dollar above the wholesale rate. The prices

actually adopted were reasonable. *Held*, that the members of the association were guilty of a conspiracy under a statute which forbids two or more persons to conspire "to commit any act injurious . . . to trade or commerce." *People* v. *Sheldon*, 34 N. E. Rep. 785 (N. Y.).

From the report of the principal case in the court below, 66 Hun, 590, it appears the association gave notice to wholesale dealers to sell to nobody in Lockport not a member. The statute under which the defendants were indicted is a very old one in New York, said to be declaratory of the common law. *People* v. *Fisher*, 14 Wend. at p. 17. When the case appeared in the court below, it was suggested, therefore, in a note in HARVARD LAW REVIEW, vii. 52, that the conspiracy was in the attempt to prevent the wholesale dealers from selling to anybody outside the association, and not in the mere contract to fix prices. Such an agreement, though unenforceable, is not at common law a crime. *Mogul S. S. Co.* v. *McGregor* (1892), App. Cas., at pp. 39, 46, 47. In the Court of Appeals, however, Andrews, C. J., adopts a construction of the statute which seems to make every contract in restraint of trade a crime, and does nor even mention the attempt of the association to "boycott" all who are not members. Such a construction of the statute is entirely possible, though there are strong reasons of expediency against it. Wharton Crim. Law, 9th ed. §§ 1366–69.

EVIDENCE — BURGLARY — EVIDENCE OF OTHER BURGLARIES. — In a trial for burglary, evidence that other burglaries were committed on the same night was admitted, in connection with proof that footsteps found about the houses entered corresponded with the shoes worn by defendant. *Held*, that the evidence was properly admitted, as tending to show a general system under which the crime in question was committed. *Frazer* v. *State*, 34 N. E. Rep. 817 (Ind.).

Although questions of this nature are largely within the discretion of the trial judge, still it would seem that this was a case in which the upper court might well have interfered. The principle relied on is perfectly sound. Though in general in a trial for a crime, evidence that defendant committed another crime is inadmissible, as proving nothing but defendant's wickedness, yet such evidence is undoubtedly admissible where it tends to show the existence of a general plan, pursuant to which the crime in question was committed. *Commonwealth* v. *Robinson*, 146 Mass. 571. But it is submitted that the principle was misapplied in this case: The evidence submitted apparently shows not such a general plan, but rather several distinct burglaries, supposed to have been committed by the defendant, which have no logical bearing upon the crime for which he was being tried.

EVIDENCE — CONJECTURAL AND MISLEADING. — Defendant was a packing company, and plaintiff, as its employee, was engaged in piling barrels. A barrel in a lower row of the pile commenced to leak, and, by order of defendant's foreman, the head of the barrel was knocked out and its contents removed. Subsequently, some barrels on the top of the pile fell off and struck plaintiff, breaking his leg. Plaintiff claimed that the injury was caused by negligence of defendant in allowing the empty barrel to remain in such a position. Defendant offered to prove by its foreman that experiments with similar piles of barrels had been made, and that a barrel in the same relative position as the empty barrel in this case had been removed without causing the pile to fall. This evidence was excluded at the trial. *Held*, no error. *Libby et al.* v. *Scherman*, 34 N. E. Rep. 801 (Ill.).

The court say that such evidence is conjectural merely, and would involve a multitude of collateral issues. Such questions seem to lie very largely in the discretion of the trial judges, and their rulings are not often reversed by the courts, unless a strong case is made out. This is, therefore, a question on which courts may well differ. If it could be shown that the experiments were made under substantially the same conditions as existed in the case in question, it would seem that the evidence might be admitted as tending in some degree to disprove defendant's negligence, provided it was submitted to the jury with careful instruction as to its weight and bearing. Evidence of a similar kind was admitted in the following cases: L. R. 1 C. P. 300; 107 U. S. 519; 52 N. H. 401. In the following it was excluded: 3 Allen, 410; 33 N. J. Law, 260.

EVIDENCE — STATUTORY PRESUMPTIONS. — A statute making it a misdemeanor to use or traffic in certain kinds of bottles, unless they have been sold by the original owner, or his written consent to their use has been obtained, declares "the having, by any junk-dealer, . . . possession of any such bottles . . . without such written consent," "presumptive evidence" of unlawful traffic in them. *Held*, that such a provision does not restrain the jury from acquitting the prisoner even though there be no evidence beyond the fact on which the presumption is declared to rest, but, on the contrary, they must still acquit if they are not satisfied beyond a reasonable doubt of

the guilt of the accused; that the fact on which the presumption was to rest has a fair relation to and a natural connection with the main fact; and that, therefore, the Legislature did not exceed its powers in enacting that the presumption should exist. *People* v. *Cannon*, 34 N. E. Rep. 759 (N. Y.).

This decision is noteworthy for bringing out more clearly than previous decisions that these statutory presumptions leave room for the jury to have reasonable doubts as to the prisoner's guilt, and allow the jury to acquit him, though no evidence to rebut the presumption be offered. Justice Earl's opinion would have been still more satisfactory if his language had been such as to leave clear beyond a doubt that the court considered it no part of the legitimate effect of these statutes to regulate in any way the jury in passing on the facts. It is submitted that such regulation is no part of their legitimate effect, and that their proper effect is simply to require the trial judge to leave a case to the jury where the designated fact is all that is given in evidence, when without the statute he might have directed an acquittal on the ground of lack of evidence, and, as a corollary, restrain him from setting aside a verdict as against evidence when such fact is the only evidence in the case.

REAL PROPERTY — DEED — BOUNDARIES. — Land was deeded by plaintiff's ancestors to defendant's grantors, described as beginning on north side of Bloomingdale Road, . . . thence by various courses to place of beginning. The road was closed legally, and plaintiff now seeks to recover one-half of it by an action of ejectment. Defendant claims it by the deed. *Held*, though the grantor may have retained the fee, it was subject to a private easement, impliedly granted, of which the grantor, his heirs, and assigns, cannot, after the highway is closed, deprive the grantee or his successors in title. *Holloway* v. *Southmayd*, 34 N. E. Rep. 1047 (N. Y.).

This is the view of the majority of the court, Earl, Finch, and O'Brien, JJ., dissenting. Maynard, J., adopts what is submitted to be the most consistent view, — that the fee passed by the deed to the centre of the street. Gray, J., who delivers the opinion of the majority, does not meet this question squarely, but says, whatever the law may be on that subject, the implied grant of an easement is enough to decide the case. It may be doubted whether, if a man expressly excludes the highway in his deed (as must be assumed here to support this as an easement), he impliedly grants an easement. The two things seem inconsistent. The simplest and soundest view is that the grantee took to the centre of the road. The deed read "beginning at north side . . . along the road." These words have been held insufficient to rebut the ordinary presumption that the grant is to the middle of the road. 33 Pa. 124; 39 N. J. L. 469; *contra*, 2 R. I. 508; 38 Mich. 62; 141 Mass. 51. See also Washburn on Real Property, vol. iii. pp. 423 *et seq.*

REAL PROPERTY — LANDLORD AND TENANT — FIXTURES — CHATTEL MORTGAGE. — A lease of mining land provided that whatever machinery the lessees might put in should form part of the realty, but that upon the termination of the lease the lessees should, on paying all rent and taxes, be entitled to remove such machinery. *Held*, that this provision included certain machinery on the land at the time the lease was executed, at that time purchased by the lessees from the lessor for unpaid rent, superior to the claims of the defendant under a chattel mortgage given by the lessees at the time the machinery was purchased from the lessor. *Pendill et al.* v. *Maas et al.*, 56 N. W. Rep. 597 (Mich.).

This somewhat forced construction of the lease raises the question whether the purchaser of property of the nature of fixtures may prevent its becoming part of the realty on being affixed thereto, as against the owner of the fee, — either a lessor or a subsequent vendee or mortgagee, — by placing upon it, at the time of purchase, a chattel mortgage; and the decision, that he may not, follows the same principle in *Clary* v. *Owen*, 15 Gray, 522 (Mass.). The extreme view opposed is that of *Ford* v. *Cobb*, 20 N. Y. 344, where the holder of a chattel mortgage on fixtures is allowed to take them, as against a subsequent mortgagee of the realty who took his mortgage on the faith of these fixtures. A more satisfactory decision is reached in *Davenport* v. *Shants*, 43 Vt. 546, where the holder of a chattel mortgage is allowed to take the fixtures except where the vendor or mortgagee of the realty has relied upon them, as part of the realty, in buying or accepting the mortgage.

REAL PROPERTY — NATURAL GAS — INJUNCTION. — Plaintiffs induced defendants to drill a gas-well in their land adjoining plaintiffs', expecting to buy it when completed. There was a disagreement about the price, and defendants allowed it to burn without utilizing it in any way. This tended to drain the sand-rock and reduce the flow in the wells on plaintiffs' land. Plaintiffs went on defendants' land and closed the well. Defendants now threaten to remove the cap, and an injunction to restrain them is sought. *Held*, no injunction will be granted. Defendants had the right to use the gas

in this way as well as any other. *Hague et al.* v. *Wheeler et al.*, 27 Atl. Rep. 714 (Pa.).

SALES — FRAUD — EFFECT OF JUDGMENT. — A sale induced by fraud is not affirmed by a judgment recovered in an action for the purchase-money brought by the vendor in ignorance of the fraud. *Rochester Distilling Co.* v. *Devendorf*, 25 N. Y. Supp. 200.

The decision is sound. Fraud makes a sale voidable at the election of the party who was deceived, and his acts before learning of the fraud do not affect the right of rescission, provided third parties are not prejudiced. The precise point decided here seems to have come up only twice before, viz., in *Krause* v. *Thompson*, 30 Minn. 64, cited by the court, and in *Foundry Co.* v. *Hersee*, 103 N. Y. 26.

STATUTES — IMPEACHMENT OF. — *Held*, that an enrolled bill on file in the office of the secretary of state, in all respects regular on its face, bearing the signatures of the presiding officers of the houses of the Legislature, regularly approved by the governor, and deposited in such office, as required by the constitution, is conclusively presumed to have been regularly passed by the Legislature. *State ex rel. Reed* v. *Jones*, 34 Pac. Rep. 201 (Wash.).

This point is hotly contested, and has been decided in nearly every State, with the result that the courts are very evenly divided, — a slight majority being in favor of the view that the journals control the enrolled Act. 7 Harv. Law Rev. 186. The Washington court follow the recent decisions in *State ex rel. Hoover* v. *Chester*, 17 S. E. Rep. 752 (S. C.); 7 Harv. Law Rev. 186; and *Field* v. *Clark*, 143 U. S. 649.

TAXATION — ASSESSMENT — OMISSIONS. — Certain real estate was omitted from assessment for city, county, and State taxes because the assessors believed that it was legally exempt. It was, however, liable. *Held*, that the omission did not invalidate the whole assessment. *Van Deventer* v. *City of Long Island*, 34 N. E. Rep. 774 (N. Y.).

This decision is the only reasonable one which could have been made and is in accord with all the authority — see Cooley Taxation, 2d ed., pp. 216, 217, *n.* 1, — but is interesting on account of its relation to a line of cases in the same jurisdiction beginning with *Hassan* v. *Rochester*, 67 N. Y. 528, which decide that where a local improvement is to be paid for by an assessment on all land within certain prescribed limits, the omission of any lot invalidates the whole assessment. The court virtually admits that there is no distinction on principle between the two classes of cases, and distinguishes them on the practical ground that if omissions were held to invalidate general assessments, few assessments could stand assault, and collection of revenue for government purposes would be attended by interminable litigation and would be uncertain. But there are many assessments on limited districts where the number of lots comprised is sufficiently large for these reasons to apply with nearly as much force as in the case of general assessments; and when an assessment on such a district comes before the New York court, the reasoning of this opinion will be pressed to make the court break in upon the rule of *Hassan* v. *Rochester*.

TORTS — ARREST WITHOUT WARRANT. — A warrant for the arrest of the plaintiff, who resided at a distance, having been issued to the defendant, he sent a deputy to execute it, but retained the warrant himself. The plaintiff now brings this action for false imprisonment during the time he was in the hands of the deputy, on the ground that the absence of the warrant made the detainment illegal. But *held*, that, the warrant being valid and properly executed, the plaintiff had no cause of action; for the irregular exercise of power legally conferred could give no ground of action, unless the irregularity was of a character to work loss or deprivation of freedom to the person arrested, which would not have followed an arrest in every respect regular. *Cabell, Marshal*, v. *Arnold*, 23 S. W. Rep. 645 (Texas).

The above decision would seem to be correct. There is, however, great conflict of authority upon the point. *Smith* v. *Clarke*, 21 Atl. Rep. 491 (N. J.), is a fair exposition of the opposite view. There the fact that the plaintiff would have been justified in resisting the arrest is held to show the arrest illegal. The answer given to this argument is that the cases justifying resistance to arrest where no warrant is exhibited, are all criminal, and that in them the *animus* of the prisoner is all-important. So that it may well be that an attempt to arrest without showing a warrant may justify resistance as affording reasonable grounds for supposing the attempt illegal, though in fact it is legal.

TORT — DUTY OF CARE TOWARDS A LICENSEE — NEGLIGENCE OF OWNER OF PREMISES. — The owner of premises left them open in such a way as to extend an implied invitation to the plaintiff to use a certain building. In passing to the building plaintiff fell into an excavation which defendant, the owner, had made in the path, and

which was negligently left uncovered. *Held*, that the defendant was liable for the injury, provided the plaintiff was using the premises in accordance with the implied invitation. *Phillips* v. *Library Co.*, 27 Atl. Rep. 478 (N. J.).

This case is entirely sound. The distinction between a mere licensee, or a licensee by sufferance, and an invited licensee, is well taken. Towards the former there is a duty in regard to the state of the premises to refrain from acts wilfully injurious. Towards the latter there is the added duty to inform him of any hidden defect or danger in the premises of which the owner has notice.

TORT — LIBEL — QUALIFIED PRIVILEGE. — An agent of defendant railroad company received a letter from attorneys putting in a claim for baggage of their client (plaintiff), lost by the railroad company. The agent in his answer to the attorneys charged their client with the larceny of the baggage. *Held*, such agent has, under the circumstances, a qualified privilege, and the company will be liable only on proof of malice or the absence of honest belief in the truth of the statements of the letter. *Alabama, &c. Ry. Co.* v. *Brooks*, 13 So. Rep. 847 (Miss.).

The opinion in this case is a concise and clear exposition of the reason for the doctrine of qualified privilege and of its extent. All that is necessary to entitle a communication, containing defamatory matter, to be regarded as privileged, is that the relation of the parties should be such as to afford reasonable ground for supposing an innocent motive for giving the information and to deprive the act of an appearance of officious intermeddling with the affairs of others. *Lewis* v. *Chapman*, 16 N. Y. 369. To be considered as privileged, however, the libellous matter must be consistent with the exigency of the occasion; this is clearly shown by Brett, L. J., when he says, "If the occasion is privileged, it is so for some reason; and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason." *Clark* v. *Molyneux*, 3 Q. B. Div. 237. As to the necessity of this doctrine of privilege, "if fairly warranted and honestly made, such communications are protected for the common convenience and welfare of society." Parke, B., in *Toogood* v. *Spyring*, 1 Cromp. M. & R. 181.

TORTS — PROXIMATE CAUSE — INJURIES CAUSED BY FRIGHT. — Plaintiff was standing on a crossing at the foot of a hill, waiting for a chance to go aboard one of the defendant's cars, which was stationed opposite her. While she stood there, a horse-car came upon her, driven downhill at such speed that before the driver could stop the horses, their heads were on either side of the plaintiff, who fainted from the fright and excitement. As the result of the shock she became ill, suffered a miscarriage, and was sick for a long time. *Held*, that the plaintiff may recover if her physical injury, though caused by the mental shock, was the natural result of the defendant's negligence. *Mitchell* v. *Rochester Ry. Co.*, 25 N. Y. Supp. 744.

For a discussion of this case, see the Notes.

TRUSTS — DISTRIBUTION OF ASSETS — UNJUST ENRICHMENT. — An insolvent corporation misappropriated funds belonging to the plaintiff, and used them to discharge its liabilities. The question was whether the plaintiff's claim should be preferred to those of the general creditors. *Held*, that unless property of the plaintiff had gone into the hands of the assignee in its original or in a substituted form, whereby the assets are so much larger, the plaintiff was entitled to no preference. *Slater* v. *Oriental Mills*, 27 Atl. Rep. 443 (R. I.).

In giving the opinion of the court, Stiness, J., says: "So long as he [the defrauded person] seeks to recover what he can show to be his own, he is in the position of an owner; but when he cannot do this, and seeks to recover payment out of the trustees' general estate, he is in the position of a creditor." That is to say, the plaintiff has no preference unless he can trace his property specifically or into its product. It is respectfully submitted that if that is the doctrine of the case, it is wrong. To support their view, the court make use of the following example, somewhat abbreviated here: D, an insolvent debtor, has assets equivalent to $1000. His liabilities amount to $2000, — one half due A, and the other half due B. If a distribution were made, A and B would get $500 each. But suppose D collects $1000 for F, which he misappropriates, and pays A's debts in full. Now, were F entitled to the entire amount of his claim, B would get nothing; therefore, the court argues, F's claim must not be preferred. But let us add one further fact, which may or may not have existed in the principal case, — that D finds it absolutely necessary to discharge A's claim, in order to maintain his credit, and that instead of taking his own property to pay A, he appropriates that of F. The result is that D has $1000 which B. and F. claim. There would have been nothing left, unless D had stolen F's money; therefore, to give B one-half would allow him to reap the benefit of D's theft, at the expense of F, who never trusted D's solvency. F, therefore, should be paid in full.

In cases like this, where it is impossible to trace the assets, a just result cannot be reached without determining whether the debtor's assets are larger than they would have been had the misappropriation never taken place. In case they are, then the plaintiff deserves the amount saved to the estate by the use of his property; of course if the debtor wasted the property, the plaintiff has no preference. Such a question of fact would doubtless be very difficult to determine in many cases, but not more so than many others which come before a court. See Perry on Trusts, § 128, for the cases cited.

TRUSTS — PARTIAL ASSIGNMENT OF A CHOSE IN ACTION. — R. was indebted to plaintiff, and executed to him the following instrument: "I have in trust for [plaintiff] $325, which money I have left at Messrs. C. & B." At that time C. & B. owed R. $332. *Held*, that the instrument operated as an equitable assignment to the extent of $325 of R.'s claim against C. & B., and the assignment secured the assignee against subsequent garnishee process by a judgment creditor of R., notice having been brought to the attention of the court before judgment was rendered in the garnishee process. *Stillson* v. *Stevens*, 23 S. W. Rep. 322 (Tex.).

This decision is a sound one, but it is to be regretted that the Texas court did not see fit to consider the true nature of so-called assignments of *choses in action* in general, and of partial assignments in particular. In early systems of law, *choses in action* were not transferable, since the consent of all parties to a contract was, as it is now, necessary to change any of the terms of the contract relation. But in time this rule of non-transferability came to be evaded by the appointment of an attorney who sued, for his own benefit, in the name of one of the parties to the contract. This appointment, unfortunately for the clearness and terminology of the subject, was called the assignment of a *chose in action*. In the Roman law it was the *procuratio in rem suam*. By this so-called assignment, the legal title to the *chose in action* does not pass, for the *chose in action* is not transferable; but the right of the assignee is a legal right, — a power of attorney to sue in the assignor's name for the benefit of the assignee. This right can be exercised perfectly at the common law, and is a thing of value, — a legal right of property. It is to be remembered, however, that the assignor, being the legal owner of the *chose in action*, has the power, though not the right, to release his contract claim; and if he is about to make such release, the assignee may resort to a court of equity for protection. Such being the true nature of a total assignment of a *chose in action*, it is clear that since a partial assignment does not operate as a power of attorney, the partial assignee has no remedy at law, although his rights are fully protected, almost everywhere, in equity. The position of a partial assignee is to be distinguished from that of one to whom a total assignment is made, partly for the benefit of the assignee, and in trust as to the residue for the assignor; such total assignment operates as a perfect power of attorney. The nature of a partial assignment which, as said above, gives the partial assignee an equitable interest only, has never been very clearly explained. It would seem to resemble an equitable charge more nearly than anything else; he who makes the partial assignment practically imposes a charge enforceable in equity upon the *chose in action* to which he retains title. The assignor is clearly not a trustee; there is no fiduciary relation between him and the partial assignee. The relation is one of an equitable right, but not of a trust. This view is made clearer, perhaps, by a comparison with the relation of an express trust. If, for instance, a partial assignor collects money which is the subject of the *chose in action*, he will hold it in constructive trust for the partial assignee. Had no such collection been made, the obligor would have fulfilled his duty by paying the partial assignee his proportionate part. On the other hand, where the relation is one of express trust, payment must be made to the trustee, and not to the *cestui*.

Authorities on this subject will be found in Ames' Cases on Trusts, 2d ed., pp. 59–76.

TRUSTS — PRIORITY OF NOTICE BY SUCCESSIVE ASSIGNEES OF AN EQUITABLE CHOSE IN ACTION. — A and B were trustees. The *cestui* made a settlement upon X, of which A alone had notice. The *cestui* then wished to suppress the settlement and mortgage her interest. The mortgagees, on inquiry of A as to incumbrances, received an evasive answer. B told them he knew of none. The mortgage was therefore completed, and notice was sent to A and B. A died without ever telling B of the settlement, and a new trustee was appointed in his place. *Held*, X should not be deprived of his priority over the mortgagees by the death of A, who at the time the mortgage was given by the *cestui* was in possession of notice of X's claim. *Ward* v. *Duncombe* (1893), App. Cas. 369.

For a discussion of this case, see the Notes.

TRUSTS — SUBSTITUTED TRUSTEE — DISCRETIONARY POWER. — Testatrix bequeathed a fund to her son upon trust to pay the income to her daughter Eva during

her life and "any portion of the principal of the said trust fund as it shall seem to him proper for her support and comfort." The trustee died. The court appointed a new trustee, who paid part of the principal to the daughter. *Held*, that since the deceased trustee had an imperative duty to provide for testatrix's daughter by using the power, it could be exercised by the trustee appointed by the court to succeed him. *Osborne* v. *Gordon*, 56 N. W. Rep. 334 (Wis.).

The decision must be approved, for it carries out the intention of the testatrix to make a provision for her daughter during her life. The case follows the authorities. See 1 Perry on Trusts, § 20.

REVIEWS.

CASES AND OPINIONS ON INTERNATIONAL LAW, WITH NOTES AND A SYLLABUS. By Freeman Snow, Ph. D., LL.B., Instructor in International Law in Harvard University. Boston: The Boston Book Co. 1893.

It has often been said that the free use of cases in the study of the law is only a single instance of the modern theory of teaching. The belief that *melius est petere fontes quam sectari rivulos* is of the essence of the modern spirit. Dr. Snow's admirable volume is a significant illustration of the truth of this view. The book contains the essential parts of the great cases on international law, and of the more famous opinions of the diplomatists who have dealt with it. Coupled with these are full references to the text-books of acknowledged authority. These references are systematically grouped under specific heads, and arranged in the order of topics. It is thus made possible, as Dr. Snow says, to compare the opinions of eminent writers, in many cases, "with the sources upon which they all rely." Dr. Snow's book is welcome, not only for itself, but also as an application of the "case system" outside the immediate influence of the Law School, and as an excellent illustration of what that system at its best really means.

E. B. A.

PARLIAMENTARY TACTICS FOR THE USE OF THE PRESIDING OFFICER AND PUBLIC SPEAKERS. Arranged by Harry W. Hoot. New York: Scientific Publishing Co. 1893, pp. 51.

This compact and elementary little manual of the rules of procedure in debating bodies aims solely at brevity and convenience. The rules are stated in their shortest form, with no attempt at analysis or discussion. The scheme of arrangement is simple and efficient. The questions of common parliamentary law are indexed on the right-hand margin of the book, in their order of precedence, and an inexperienced presiding officer can thus see at once, without turning a page, whether or not a given motion is in order. The book is so arranged that it can be carried easily in the pocket.

E. B. A.